IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

SHAH PUKHRAJ AND OTHERS.	V.	LEGAL REPRESENTATIVES OF KESHARI MAL .

D.B. CIVIL SPECIAL APPEAL NO.21/2000, against the judgment & decree dated 24-3-2000,passed by the learned Single Judge in S. B. Civil Regular First Appeal No.100/81.

DATE OF JUDGMENT :::: 27.07.2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr. T.S.Champawat, for Appellants.
Mr.Rajesh Choudhary for
Mr.Suresh Shreemali, for Respondents.

BY THE COURT: (PER HON'BLE BHANDARI, J.):-

This appeal is directed against the judgment and decree passed in Civil First Appeal No.100/81 dated March 24, 2000.

Factual matrix of the case is that Late Kesarimal filed a suit for possession of house No.192 situated at Sirohi. Plaintiff

Kesarimal later on died during the pendencyof First appeal, therefore, his legal representatives were brought on record. It was the case of plaintiff that land measuring 2208 sq. yds. Was purchased byhis father Dhupaji vide Patta No.93 dated 5.4.1935 in the name of Shah Dhupaji Kesarimal Dahaji. After purchase of land, various constructions were undertaken which includes construction of a house. The case of the plaintiff was that he had given house to Javer Chand three years before his death. Said Shri Javer Chand died in Samvat year 2006. After death of Javer Chand, defendants No. 1 to 4 were allowed to continue to occupy the property in question, though during the intervening period, in a decree against defendant No.1 Pukhraj, house in question was attached by the decree-holder. On raising objection by the plaintiff regarding right of the defendant – Pukhraj. The matter was decided in favour of the plaintiff on 18.2.1956, by holding the right of the plaintiff on the property, against which defendant No.1 Pukhraj did not file an appeal.

After decision of the objections in favour of the plaintiff by the Munsiff Court, Bali dated 18.2.1956, plaintiff asked the defendants to vacate the premises. When the defendant failed to vacate the premises, the plaintiff preferred a suit for possession along with claim of mesne profits. In the written statement filed by the defendant, he denied title of the plaintiff and claimed property to be a joint property of his father Javer Chand with that of Dhupaji Kesarimal. It was alleged that his

father Javer Chand has purchased property jointly and, thereafter, raised construction of house, thus they are in possession of the property since Samvat year 1989. The defendant denied the allegation of occupation of house by them under the license of plaintiff.

The trail Court, at the first instance, dismissed the suit mainly after applying Article 142 of the Limitation Act and thereby it was held that the plaintiff has failed to prove his possession over the house within 12 years from the date of the suit. Aggrieved by the judgment, plaintiff preferred appeal which was then allowed by the learned Single Judge of this Court vide his judgment dated 25.4.1969. However, aggrieved by the said judgment, defendant preferred a special appeal before the Division Bench and the Division Bench vide its judgment dated 18th December, 1979, remanded the case of the trial Court. The remand of the case was with the permission of the parties to lead their evidence on issue No.9 and the trial Court was directed to decide issues No.4, 9 and 11 afresh. The issue No.11 was framed by the Division Bench.

After remand, the trial Court once again dismissed the suit after recording finding that defendants are found to be in possession in the disputed property for about 12 years. Aggrieved by the said judgment and decree, first appeal was preferred before the High Court and during the pendency of the first appeal, plaintiff Kesarimal died apart from the death of

defendant No.2 Chhaganlal and defendant No.4 Smt. Sakhu Devi. Thus, their legal representatives were brought on record.

Learned Single Judge had taken note of the fact that so far as dispute pertaining to title of land is concerned, it was finally resolved by the trial Court at the first instance while recording its finding in favour of the plaintiff. Thus, the only issue was pertaining to adverse possession of the defendant. The learned Single Judge accepted the appeal preferred by the plaintiff after holding that the defendant has failed to prove his hostile title to the suit property to the knowledge of true owners within 12 years of the filing of the suit. It was further held that the possession of defendant cannot be considered to be not permissive in a case where only physical possession of the defendant is admitted by the plaintiff to be sufficiently long period and denial of title is claimed to have taken place at a later stage. After marshaling the evidence led by the parties, the learned Single Judge came to the conclusion that the findings recorded by the learned trial Court are not correct. Thus, while the judgment and decree of the trial Court was set aside, suit of the plaintiff was decreed. Thus, this special appeal.

The learned counsel appearing for the appellant mainly argued that the defendant having proved their possession of more than 12 years before filing of the suit, then it becomes clear that the suit was barred by limitation as defendant got a right of adverse possession. It was mainly argued that suit

property was occupied by the defendant in Samvat Year 1989 and not Samvat Year, 2003 as stated by the plaintiff. Learned counsel further submitted that the learned Single Judge has wrongly recorded finding regarding deposition of house tax by the plaintiff, hence supporting the finding of the learned trial Court, it was urged that the judgment passed on such finding deserves to be set aside. It was lastly contended that it was not the case of the plaintiff that defendants were in permissive possession of plaintiff.

Per contra, learned counsel for the respondent non-appellants supported the judgment of the learned Single Judge and submitted that the fact regarding possession of the suit property from Samvat Year, 1989 could not be proved by the defendant, more so, it was proved by the plaintiff that the house was given to the defendants in Samvat Year, 2003 at the time of marriage of Panni Devi (daughter of defendant). It was thus submitted that it is a clear case of permissive possession and having a decision of Munsiff Court in their favour, in other case, holding that the plaintiff is having right in the property in dispute, the defendant cannot claim rights otherwise, more so when the defendants were asked to vacate property immediately after decision of the objections submitted by the plaintiff in a matter where suit property was attached in a decree passed against defendant Pukhraj. The non-appellants submitted that the defendant had firstly taken a plea of title of a suit premises

and in contradiction to the said plea, issue of adverse possession was raised which is nothing but self-contradictions of the pleas of the defendant who in fact was residing in the house of Dhanmal, when marriage of Pukhraj (defendant) was celebrated in the year, 1999. Thus, acquiring suit property adverse to the right of the plaintiff does not arise.

We have given our thoughtful consideration to the rival submissions made by the parties and carefully perused the judgment as well as record of the case. The perusal of the judgment rendered earlier by the Division Bench revealed that case was remanded to the trial Court for its fresh decision on issues No. 4, 9 and 11 and parties were permitted to lead their evidence on issue No.9. Thus, issues pertaining to title of property became final in favour of the plaintiff. The Division Bench held that the suit would be governed by Article 142 of the Limitation Act of 1908. After remand of the case, so far as the plaintiff is concerned, he submitted evidence to prove permissive possession of defendant, however, in rebuttal, defendant failed to submit cogent evidence for his adverse possession. We have carefully perused the statements of the witnesses in that regard to see whether it was a case of permissive possession of the defendant or not. The facts available on record show that the defendant was in permissive possession of the suit property from Samvat Year, 2003 when the property in reference was given to the defendant for celebration of marriage of Panni Devi.

The further facts reveals that when the property in dispute was attached in a decree passed against defendant Pukhraj, then also, the objections were decided in favour of the plaintiff, holding his right in the property and, thereafter, no appeal was preferred by the defendant to show his right and title in the property. The facts available on record further show that out of total area of 2208 sq.yds, major portion always remained in possession of the plaintiff. The defendant failed to prove contrary to show his adverse possession to treat the suit beyond the period of limitation. In fact, defendant raised objections asserting their right to the property for the first time when the suit in possession was filed by the plaintiff. Therefore, it becomes clear that prior to such assertions, possession of the defendant becomes permissive and not adverse to plaintiff.

The learned Single Judge has recorded his finding after taking note of each and every aspect of the matter raised before him and as there exists no perversity or illegality in the judgment under appeal, more so when during the course of arguments itself, learned counsel for the appellant could not satisfy that it was not a case of permissive possession of defendants, hence dismissal of suit by the trial Court was rightly been set aside by the learned Single Judge. We, therefore, concur with the finding of the learned Single in the light of the discussions made above. Thus, this appeal preferred by the defendant, being devoid of merit, hence dismissed by affirming

the judgment and decree of the learned Single Judge dated 24th March, 2000. Parties to bear their own costs.

(MUNISHWAR NATH BHANDARI),J. (BAGWATI PRASAD),J.

Scd.